

ARTICLE IX. DEFERRED COMPENSATION PLAN.

Sec. 33-141. Definitions.

In this Article, the following words and phrases have the following meanings:

- (a) *Board or Board of Investment Trustees* means the Board of Investment Trustees established under Article III.
- (b) *Collectively Bargained Plan* means a plan established under Section 33-146B.
- (c) *County* means the Montgomery County Government, and when applicable, any participating agency.
- (d) *Employee* means any eligible elected or appointed County official and any full-time or career part-time County employee.
- (e) *Deferred compensation plan or plan* means the Deferred Compensation Plan of Montgomery County, Maryland.
- (f) *Participant* means an employee who is participating in the plan.
- (g) *Trust* means the trust established to hold all assets and income of the plan for the benefit of plan participants and their beneficiaries. (1995 L.M.C., ch. 8, § 1; 1998 L.M.C., ch. 23, § 1; 2004 L.M.C., ch. 30, § 1.)

Editor's note - Section 2 of 1998 L.M.C., ch. 23, reads as follows: "The powers and duties of the Board of Investment Trustees regarding the Deferred Compensation Plan of Montgomery County trust take effect when all trustees accept the trust agreement in writing."

Sec. 33-142. Establishment; participation.

- (a) *Establishment.* The Deferred Compensation Plan is established under Section 457(b) of the Internal Revenue Code.
- (b) *Plan document.* The terms of the plan must be contained in a plan document. The Chief Administrative Officer may amend the plan document at any time after consulting the Board.
- (c) *Participation.* Any employee may participate in the plan.
- (d) *Participating agencies.*
 - (1) Any agency that participates in the Employees' Retirement System under Article

III or the Retirement Savings Plan under Article VIII may also participate in the deferred compensation plan.

- (2) A participating agency must:
 - (A) execute an adoption agreement in a form satisfactory to the Chief Administrative Officer; and
 - (B) submit any information and execute any form or document that the Chief Administrative Officer deems prudent for purposes of maintaining the status of the deferred compensation plan as an eligible deferred compensation plan under the Internal Revenue Code.
- (3) The Chief Administrative Officer may treat a participating agency as having withdrawn from the deferred compensation plan if the participating agency does not:
 - (A) submit information or execute documents necessary to administer and maintain the plan as requested by the Chief Administrative Officer;
 - (B) qualify as a governmental entity; or
 - (C) adhere to the terms of the plan.
- (4) No liability will accrue to the County Government by the inclusion of participating agency employees in the plan. Each participating agency must be fully responsible for the cost of coverage for its employees and any necessary costs for administrative services or investment services provided. (1995 L.M.C., ch. 8, § 1; 1998 L.M.C., ch. 23, § 1.)

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Sec. 33-143. Powers and duties of the chief administrative officer.

- (a) *Administration.* Except for the powers reserved to the Board, the Chief Administrative Officer must take all actions and make all decisions to administer the deferred compensation plan, including:
 - (1) deciding the eligibility of any employee or person employed by an agency and the rights of any participant or beneficiary to receive benefits;
 - (2) computing the amount of benefits payable to any participant or beneficiary;

- (3) authorizing benefits, including the determination of hardship withdrawal requests;
 - (4) keeping records;
 - (5) consulting with the Board regarding the selection of a recordkeeper for the plan;
 - (6) determining the source of funding, under other laws and consistent with appropriations, for payment of expenses to administer the plan;
 - (7) incurring and paying expenses to administer the plan;
 - (8) preparing and filing reports required by law;
 - (9) providing to each participant, former participant, or designated beneficiary eligible to receive benefits under the plan a report of the person's account at least quarterly;
 - (10) transferring deferred amounts to the trust within a reasonable period of time and in a reasonable manner to be determined after consulting the Board; and
 - (11) delegating any power or duty under this Section.
- (b) *Procurement.* Chapter 11B does not apply to the procurement of goods and services for the deferred compensation plan by the Chief Administrative Officer.
- (c) *Interpretation.* The Chief Administrative Officer must decide questions arising under the plan and this Article. Any participant, former participant, or designated beneficiary eligible to receive benefits from the deferred compensation plan may make a written request for a decision on questions arising under the plan and this Article. The Chief Administrative Officer must decide the question and respond in writing to the request:
- (1) within 60 days; or
 - (2) within 150 days if the written consent of the person requesting the decision is obtained within 60 days.

A decision by the Chief Administrative Officer is final and binding on all interested parties and may not be appealed. (1995 L.M.C., ch. 8, § 1; 1998 L.M.C., ch. 23, § 1.)

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Sec. 33-144. Trust fund.

- (a) *Establishment of trust.* A trust is established as part of the deferred compensation plan for the benefit of participants in the plan.
- (b) *Trust fund.* All of the money and property, all investments made with that money and

property, and all earnings, profits, increments, and other additions, less payments previously made by the Board are the deferred compensation plan trust fund.

- (c) *Trust fund management and legal title.* The Board is responsible for managing the trust fund according to this Article. The Board has legal title to all cash and other property of the deferred compensation plan, but may transfer some incidents of ownership to the Board's agents as provided in this Article.
- (d) *Exclusive benefit.* The deferred compensation plan trust fund must be held for the exclusive benefit of participants and their beneficiaries, and used only to provide benefits and defray the reasonable expenses of administering the plan. Trust fund assets must not revert to the County, unless allowed under Section 457 of the Internal Revenue Code. (1998 L.M.C., ch. 23, § 1.)

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Sec. 33-145. Powers and duties of the board.

- (a) *General.*
 - (1) The Board has the exclusive authority to manage the assets of the deferred compensation plan. All powers and duties required for the management of the plan trust fund are vested in the Board of Investment Trustees.
 - (2) Sections **33-61A** (Indemnification of trustees), **33-61C** (Standard of care), and **33-61D** (Ethics and conflict of interest) apply to the Board's responsibilities under the deferred compensation plan.
 - (3) Chapter 11B does not apply to the procurement of goods and services for the deferred compensation plan by the Board.
- (b) *Duties.* The Board must:
 - (1) develop record keeping procedures to maintain and report on participant account balances;
 - (2) designate appropriate investment options to be offered to participants;
 - (3) designate a method of accounting for investments;
 - (4) designate methods of making distributions of participant account balances;

- (5) make distributions to participants, former participants, or their designated beneficiaries after the Chief Administrative Officer authorizes the benefits; and
- (6) incur and pay expenses to carry out the Board's responsibilities under the plan.

(c) *Agents for transfer of property.*

- (1) The Board may register any assets in its own name or in the name of a nominee. The Board may hold any assets in bearer form. The Board or its agent must keep records that show that the investments are part of the trust fund.
- (2) The Board may form a partnership under State law to hold or transfer assets as the nominee of the Board.
- (3) The Board may designate in writing a trustee or trustees to hold or transfer assets as a nominee of the Board.
- (4) The Board must provide that trustees or a partnership that the Board designates must act only as agents of the Board. The Board may set other conditions that the Board considers prudent.
- (5) The trustees or a partnership that the Board designates may retain the services of a bank or other financial institution to conduct required business.
- (6) The Board must maintain the indicia of ownership of the assets of the deferred compensation plan within the jurisdiction of the district courts of the United States, except as authorized in regulations adopted under method (3) that are substantially equivalent to federal regulations under the Employee Retirement and Income Security Act (ERISA) regarding indicia of ownership of plan assets.

(d) *Authorized investments.*

- (1) The Board must invest each participant's account in one or more of the Board-designated investment options in the manner directed by the participant.
- (2) The Board may select any investment options for the deferred compensation plan that the Board considers prudent within the policies set by the Board, except real property investments described in this subsection.
- (3) The Board must not invest in real property unless the investment is a pooled investment in which the Board has no power or right to manage the real estate property. The pooled investment must not invest more than 10 percent of its assets in real property located in Montgomery County. The 10-percent limitation applies to the market value of the total assets

on the preceding June 30. If the market value of investments in real property in the County exceeds the 10-percent limitation as a result of market forces, the Board, or the investment manager without direction from the Board, is not required to sell an existing equity investment. The Board may obtain valuations and take appropriate steps to comply with the 10-percent limitation.

- (4) If an investment through any combined, common, or commingled trust fund exists, the declaration of trust of that fund is a part of the deferred compensation plan trust.
- (5) The Board and any investment manager must not invest the deferred compensation plan assets in any bonds, notes, or debt instruments issued by:
 - (A) Montgomery County;
 - (B) a political subdivision in Montgomery County;
 - (C) an agency that receives support or funds from taxes levied by the County Council; or
 - (D) an agency supported by bond issues underwritten by Montgomery County.

The Board and any investment manager may invest plan assets in bonds, notes, and debt instruments of these entities if the investment is held indirectly through a mutual fund and complies with any limit in the Internal Revenue Code.

- (e) *Trustee powers.* Except as otherwise provided in this Article, the Board may:
 - (1) with any cash, purchase or subscribe for any investment, at a premium or discount, and retain the investment;
 - (2) sell, exchange, convey, transfer, lease for any period, pledge, mortgage, grant options, contract with respect to, or otherwise encumber or dispose, at public or private sale, for cash or credit or both, any part of the deferred compensation plan;
 - (3) subject to Section 33-61A(h)(2), sue, defend, compromise, arbitrate, compound and settle any debt, obligation, claim, suit, or legal proceeding involving the deferred compensation plan, and reduce the rate of interest on, extent or otherwise modify, foreclose upon default or otherwise enforce any debt, obligation, or claim;
 - (4) retain uninvested a part of the deferred compensation plan trust assets in preparation for initial investment of deferred compensation amounts or for the payment of distributions;
 - (5) exercise any option on any investment for conversion into another

investment, exercise any rights to subscribe for additional investments, and make all necessary payments;

- (6) join in, consent to, dissent from, oppose, or deposit in connection with the reorganization, recapitalization, consolidation, sale, merger, foreclosure, or readjustment of the finances of any corporation or property in which the assets of the deferred compensation plan are invested, or the sale, mortgage, pledge or lease of that property or the property of any such corporation upon such terms and conditions that the Board considers prudent; exercise any options, make any agreements or subscriptions, pay any expenses, assessments, or subscriptions, and take any other action in connection with these transactions that the Board considers prudent; and accept and hold any investment that may be issued in or as a result of any such proceeding;
- (7) vote, in person or by any proxy, at any election of any corporation in whose stock the assets of the deferred compensation plan are invested, and exercise, personally or by any power of attorney, any right appurtenant to any investment held in the deferred compensation plan; and give general or specific proxies or powers of attorney with or without power of substitution;
- (8) sell at a public or private sale, enter into an option to sell, mortgage, lease, partition, or exchange any real property at prices and for terms that the Board considers prudent. The Board may execute and deliver deeds of conveyance and all assignments, transfers, and other legal instruments for passing the ownership to the purchaser, free and discharge of all liens;
- (9) renew or extend any mortgage, upon such terms that the Board considers prudent, and increase or reduce the rate of interest on any mortgage or modify the terms of any mortgage or of any guarantee as the Board considers prudent to protect the deferred compensation plan or preserve the value of the investment; waive any default or enforce any default in a manner that the Board considers prudent; exercise and enforce any right of foreclosure, bid on property in foreclosure, take a deed in lieu of foreclosure with or without paying a consideration, and release the obligation on the bond secured by the mortgage; and exercise and enforce in any action, suit or proceeding at law or in equity any rights or remedies in respect to any mortgages or guarantee;
- (10) incur and pay expenses for agents, financial advisors, actuaries, accountants and counsel, if those expenses are incurred solely to perform the Board's duties under the deferred compensation plan;
- (11) borrow, raise or lend moneys, for the purpose of the deferred compensation plan, in such amounts and upon such terms and conditions as the Board in its discretion considers prudent; for any money borrowed, issue a promissory note and secure the repayment of this note by pledging or mortgaging all or any part of the deferred compensation plan;

- (12) hold, buy, transfer, surrender, and exercise all other incidents of ownership of any annuity contract;
 - (13) if payments to a participant or beneficiary are to be made in the form of an annuity based on one or more lives or life expectancies, buy from any legal reserve life insurance company a single premium, nontransferable annuity contract providing for the payment of the benefits;
 - (14) pool all or any of the assets of the deferred compensation plan trust with assets belonging to any other qualified pension or profit sharing trust created by the County. The Board may commingle the assets and make joint or common investments and carry joint accounts on behalf of the deferred compensation plan trust and one or more other trusts, allocating undivided shares or interests in the investments or accounts, or in any pooled assets, to the trusts according to the trusts' respective interests. The Board also may buy or sell any assets or undivided interests in any trust where the assets of the deferred compensation plan trust are pooled at the prices or valuations that the Board determines; and
 - (15) do all acts that the Board considers necessary and exercise the powers of this Article to manage the deferred compensation plan trust. The Board may exercise all powers to manage the assets that an individual could exercise to manage property owned by the individual, except for making an individual investment selection.
- (f) *Prohibited transactions.* The Board must not engage in any direct or indirect transaction between the trust and the County, or any entity controlled by the County, that would violate the prudent person rule (Section 33-61C) or result in the diversion of trust income or corpus in violation of the exclusive benefit rule (Section 33-144(d)).
- (g) *Investment management agreements.* Section 33-60(g) (Investment management agreements) applies to the Board with respect to its responsibilities under the deferred compensation plan.
- (h) *Payments.* The Board must pay all benefits and expenses of the deferred compensation plan as directed by the Chief Administrative Officer. The Board may pay expenses incurred under paragraph (e)(10) without direction by the CAO.
- (i) *Benefit recipients.* The Board may rely on the decision of the Chief Administrative Officer to identify the proper recipient of benefit payments. (1995 L.M.C., ch. 8, § 1; 1998 L.M.C., ch. 23, § 1.)

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Sec. 33-146. Amendment and termination.

- (a) *Right to amend.* The County reserves the right to amend the deferred compensation plan at any time for any reason.
- (b) *Qualification amendments.* The deferred compensation plan and any related trust agreement, investment advisory agreement, custodial agreement, annuity contract, or similar agreement may be amended at any time, either prospectively or retroactively, to conform to the Internal Revenue Code.
- (c) *Termination of the deferred compensation plan.* The County has established the deferred compensation plan expecting to continue the plan indefinitely, but the County may terminate the plan. Any transfer of assets resulting from the termination must comply with the Internal Revenue Code.
- (d) *Termination of participation by a participating agency.* If a participating agency decides to stop participating in the deferred compensation plan, the agency must notify the Chief Administrative Officer in writing. The Chief Administrative Officer and the agency must agree on a date for ending the agency's participation. Any transfer of assets resulting from the termination must comply with the Internal Revenue Code. (1998 L.M.C., ch. 23, § 1.)

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Sec. 33-146A. Miscellaneous.

- (a) *Exemption from execution, garnishment, or attachment.* The right of a participant in that participant's account balances or any other right or benefit under this Article are not subject to execution, garnishment, attachment, or any other process, and are not assignable, except under an order that qualifies as a domestic relations order under the Internal Revenue Code and meets plan requirements. The Chief Administrative Officer must establish procedures to determine whether the domestic relations order is qualified and must determine the manner and timing of distributions required under the order.
- (b) *Protection against fraud.* A person must not knowingly make a false statement or falsify or allow another to falsify a record of the deferred compensation plan to defraud the plan. A violation of this subsection is a class A violation.
- (c) *Error in records, repayment, and waiver.*
 - (1) If a change or error in the records results in any participant or beneficiary receiving from the deferred compensation plan more or less than the participant or beneficiary is entitled to receive, the error must be corrected. The payment must be adjusted to pay the correct amount. The Chief Administrative Officer must establish by regulation under method (1) reasonable procedures to correct an error, consistent with plan requirements.

- (2) The plan must pay the participant or beneficiary for any underpayment. Except as provided in paragraph (3), a participant or beneficiary who receives excess payments must repay the plan.
- (3) The Chief Administrative Officer must establish by regulation under method (1) procedures to waive repayment by a participant or beneficiary who the Chief Administrative Officer determines is without fault when repayment would be against equity and good conscience. The procedure must require the participant or beneficiary to apply for a waiver within 30 days after receiving actual notice of the overpayment and demand for repayment. The notice must inform the recipient about the waiver procedure. The Chief Administrative Officer must waive repayment of an overpayment that the plan made more than 3 years before notifying the participant or beneficiary about the overpayment. If the Chief Administrative Officer waives repayment, the CAO must repay the plan for the overpayment from a source that does not reduce the assets held in trust for other participants and beneficiaries.
- (d) *Payment of expenses.* The County may contribute to the trust to cover operating expenses of the deferred compensation plan. The Board must pay operating expenses of the plan from plan assets or from County assets, as directed by the Chief Administrative Officer. A participating agency must pay the agency's share of the operating expenses attributable to the participation of the agency's employees. (1998 L.M.C., ch. 23, § 1; 2001 L.M.C., ch. 28, §§ 8, 15 and 16.)

Editor's note-The effective date of the amendments made to this section by 2001 L.M.C., ch. 28, § 8, is the same effective date as 1998 L.M.C., ch. 23, § 1.

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Sec. 33-146B. Collectively Bargained Plans.

The County may establish and maintain one or more additional deferred compensation plans for employees covered by a collective bargaining agreement. In the case of any collectively bargained plan:

- (a) The certified representative must assume the duties and responsibilities of the Board, except for the requirements of Section 33-61(a), and the certified representative must assume the duties and responsibilities of the Chief Administrative Officer and the County under this Article.
- (b) The Board, Chief Administrative Officer, and County have no fiduciary or other responsibility for a collectively bargained plan except as required by federal law, including any regulation, ruling, or other guidance issued under that law.
- (c) The certified representative must indemnify the County and provide fiduciary liability insurance protecting itself and the County in an amount agreed to by the County and certified representative through collective bargaining.

- (d) The officers of the certified representative who have direct responsibility for plan administration, and the trustees of any trust established under this Section, must:
 - (1) provide financial disclosure to the participants of the plan in a form and manner at least as stringent as that required of the Board; and
 - (2) establish and conform to a code of ethical conduct, approved by participants in the plan, at least as stringent as that required of the Board.
- (e) The collectively bargained plan, and its separate trust, custodial account or annuity contract, must meet, in form and operation, all applicable requirements of the Internal Revenue Code and any regulation, ruling, or other guidance issued under that law.
- (f) Any trustee or fiduciary of a collectively bargained plan must not accept any direct or indirect compensation from any person who does business with that plan. (2004 L.M.C., ch. 30, § 1.)